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In the

Supreme Court

of the

United States

OCTOBER TERM, 1970

No. 864 1

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit,
Petitioner,

vs.

LEONARD H. RUBIN, individually and as father and next friend of Deborah Rose Rubin, an infant, and as members of classes and the DADE COUNTY SCHOOL BOARD,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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MIAMI REVIEW — 371-4383 — 371-3121

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TWO SUCCESSIVE INJUNCTIONS, RESTRICTING FIRST AMENDMENT RIGHTS OF ADVOCACY AND ASSEMBLY OF AN ASSOCIATION OF PUBLIC SCHOOL TEACHERS ARE VOID FOR OVERBREADTH AND BECAUSE OF BASIC INFIRMITIES IN THE PROCEDURES BY WHICH THEY WERE OBTAINED: THE FIRST BEING ENTERED AFTER THE CAUSE WAS REMOVED TO THE FEDERAL COURT UNDER 28 USC 1443; THE SECOND BEING ENTERED EX PARTE AND WITHOUT NOTICE TO AVAILABLE ADVERSARY PARTIES OR COUNSEL; AND THE CONTEMPT PROCEEDINGS BASED THEREON SHOULD BE QUASHED.	2
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No. _____

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit,

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LEONARD H. RUBIN, individually and as father and next friend of Deborah Rose Rubin, an infant, and as members of classes and the DADE COUNTY SCHOOL BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner requests the issuance of a Writ of Certiorari directed to the Supreme Court of Florida to review its decision affirming the denial of a Motion to Quash an *ex parte* injunction overbroadly restricting First Amendment freedoms when Petitioner, as adversary, was available for a hearing.

A

OPINIONS OF THE COURT BELOW

The decision of the Supreme Court of Florida is reported at 238 S(2). A prior decision of the Supreme Court of Florida in the same case is reported at 217 S(2) 293.

B

GROUNDS FOR JURISDICTION

The decision of the Supreme Court of Florida was entered July 29, 1970. This Petition for Writ of Certiorari is brought pursuant to 28 USC 1257 (3).

C

QUESTION PRESENTED FOR REVIEW

Presented for Review is the following:

TWO SUCCESSIVE INJUNCTIONS, RESTRICTING FIRST AMENDMENT RIGHTS OF ADVOCACY AND ASSEMBLY OF AN ASSOCIATION OF PUBLIC SCHOOL TEACHERS ARE VOID FOR OVERBREADTH AND BECAUSE OF BASIC INFIRMITIES IN THE PROCEDURES BY WHICH THEY WERE OBTAINED: — THE FIRST BEING ENTERED AFTER THE CAUSE WAS REMOVED TO THE FEDERAL COURT UNDER 28 USC 1443; THE SECOND BEING ENTERED EX PARTE AND WITHOUT NOTICE TO AVAILABLE ADVERSARY PARTIES OR COUNSEL; — AND THE CONTEMPT PROCEEDINGS BASED THEREON SHOULD BE QUASHED.

D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent Constitutional provisions and statutes:

First Amendment to the Constitution of the United States

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment to the Constitution of the United States

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 USC 1443

> Any of the following civil actions or criminal prosecutions, commenced in a State Court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 USC 1446

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

• • •

(c) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

Rule 1.610 Florida Rules of Civil Procedure, 1968 Revision

Temporary Injunction; Notice; Bond.

• • • •

(b) No temporary injunction shall be granted except after notice to the adverse party unless it is manifest from the allegations of a verified complaint or supporting affidavits that the injury will be done if an immediate remedy is not afforded and in such event the court may grant a temporary injunction until a hearing or further order of court. When a temporary injunction is granted, the court shall require the party obtaining it to give bond conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is wrongfully enjoined unless the court, after taking evidence from all parties of the truth of the complaint and the fact

that the party seeking the temporary injunction is unable to give bond, finds such to be true, in which event a temporary injunction without bond may be granted. When any injunction is issued on the complaint of a municipality or the State or any officer, agency or political subdivision thereof, the Court, in its discretion having due regard to the public interest, may require or dispense with the requirement of a bond, with or without surety, and conditioned as the circumstances may require.

STATEMENT OF THE CASE

Petitioner is an association of 7,500 of the 10,000 public school teachers employed in Dade County Florida. In February, 1968, all of Florida's teachers, at the behest of their local and state associations, including petitioner, engaged in a mass resignation action, protesting the failure of Florida's government to provide funds for adequate educational facilities. Schools closed as of Monday, February 19, 1968. On February 20, 1968, respondent filed a complaint against petitioner as teacher representative in the Circuit Court of Dade County to enjoin the "strike" and asking that the "teachers be specifically required to perform their contracts". A request for an *ex parte* injunction was denied, and a hearing was set for the afternoon of February 22, 1968. In the morning of that date, petitioner, asserting rights under 28 USC 1443, 1446; 42 USC 1981 et seq; and the Thirteenth Amendment (as the pertinent law stated in terms of racial equality), removed the cause to the United States District Court. (Proper notice was given to State officials: see Mr. Rubin's deposition at page 13).

Despite the immediate suspension of State Court jurisdiction, it nevertheless proceeded to hold the hearing, and entered a broadly worded temporary injunction (February 22, 1968), enjoining petitioner from picketing and from undertaking to persuade or induce any teachers under contract from refusing to work. Petitioner refused to participate in this proceeding and respondent preserved no record of it.

On the following day, February 23, 1968, the United States District Court remanded the cause to the State Court. Respondent's counsel, on being so advised, personally secured a certified copy of the remand order for delivery to the State Judge. As he entered the County Court House, he met and talked to counsel for petitioner in the lobby. He did not advise him of the order of remand; or that he was seeking another injunction from the State Judge. Following a brief conference, solely with respondent, the State Court entered its second injunction in the late afternoon of February 23, 1968. This document is substantially identical to its precursor; except, that it purports to rely upon a "verified complaint" rather than "testimony of the witnesses"; it acknowledges that the cause had been removed to the District Court which "refused jurisdiction . . . and the case being remanded"; it provided for service upon petitioner's attorney, rather than upon its executive officers.

At 6:50 P.M. on February 23, 1968, and within an hour after filing, the respondent served the temporary injunction. This was petitioner's first notice of its existence, despite the presence of their officers and their counsel's availability to attend any hearing the State Court might have scheduled.

Petitioner filed a motion to dissolve the temporary injunction (February 27, 1968) asserting the denial of due process in the injunction by its method of issuance and its proscription of First Amendment freedoms; which was denied (February 28, 1968). Pertinent portions are as follows:

> "Defendant, DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit, respectfully moves this Honorable Court for the entry of an order dissolving the temporary injunction heretofore issued in the within cause, and in support thereof states:
>
> 1. That there is no basis for the issuance of an injunction; the same was issued without notice or hearing; the same constitutes an unconstitutional deprivation of the rights of the defendant in that it denies to it the rights of speech, assembly and petition as guaranteed by the First and Fourteenth Amendment to the Constitution of the United States."

When the schools did not reopen on Tuesday, February 27, 1968, respondent sought and obtained an Order setting a contempt hearing. On February 28, 1968, the State Court entered its Order on Contempt, finding petitioner guilty of disobedience to "the injunctive orders of this Court entered on *February 22 and 23, 1968*". (our emphasis)

Appeal to the State Court of Florida resulted in a reversal of the Contempt Order (December 10, 1968: 217 S(2) 293) on purely State grounds, that Court rejecting Federal claims which had been raised and argued by petitioner.

In January, 1969, the Trial Court, *ex parte*, issued its second Contempt Order based on alleged violation of only the February 23, 1968, *ex parte* injunction. Petitioner filed a Motion to Quash which was denied by the State Court on March 7, 1969. Pertinent portions raising Federal claims are as follows:

> "The Respondents, by their undersigned counsel, for their response to the Rule Nisi heretofore issued in the within cause, and for their motion to quash the said Rule Nisi, respectfully state unto this Honorable Court:
>
> 1. The Respondents are not guilty.
>
> 2. The injunction upon which the Rule Nisi is based is void for the reason that the same was merely a reissuance of a temporary injunction that had been issued while the cause had been removed to the United States District Court.
>
> 3. The injunction upon which the Rule Nisi is based is void for the reason that the same was issued ex parte and without notice at a time when Respondents were available for service and hearing; and that there was no necessity for the entry of an injunction without notice and without hearing on Friday, February 23, 1968.
>
> • • •
>
> 5. The injunction upon which the Rule Nisi is based is in violation of the rights guaranteed to the Respondents by the First and Fourteenth Amendments to the Constitution of the United States.

6. The injunction upon which the Rule Nisi is based is void in that it is too vague and so subject to differing legal interpretations that it could neither stand nor be enforced by contempt proceedings."

This order, denying the Motion to Quash the injunction, was appealed to the State Court of Florida, which affirmed on July 29, 1970 (238 S(2)).

(Stays were denied, while the appeal was pending, and in the interim petitioner was again tried, and found guilty of contempt. The judgment and sentence of contempt have been appealed; but the Supreme Court of Florida has stayed all proceedings thereunder until the underlying questions herein raised are disposed of by this Court.)

Federal questions sought to be reviewed were immediately raised at the trial level in motion to dissolve the temporary injunctions and to quash contempt proceedings based thereon. The Trial Court denied same by written orders, but without specific reference to the issues. The questions herein presented for review are identical to the issues on appeal to the Supreme Court of Florida. That Court rejected the Federal questions on each occasion the matter was presented to it. (App. A)

In its decision of July 29, 1970, the Supreme Court of Florida refused to quash the contempt proceedings; holding that the injunctions were valid. In the opinion of the Supreme Court, the Trial Court had jurisdiction to issue the February 22, 1968 injunction because irregularities in the removal procedure continued jurisdiction in the State Court; the Trial Court had jurisdiction to issue the February 23, 1968, *ex parte* because it was merely a reissuance of the previous and valid injunction.

The Supreme Court of Florida did not rule that disobedience to the injunctions prior to testing their validity was fatal — because, whatever the rule of law in Alabama or the Federal jurisdiction to this effect, — this is not the law of Florida.

In Florida, a void injunction can be disobeyed with impunity. The individual acts at his peril; if he is charged with contempt, he may defend the action by showing the Order to be void. The Court said, in its Opinion:

> "... it is clear that because of their willful violations of the injunction and the absence of any resort to their legal remedies for testing the validity of the injunction, the Association and its officers have no standing to raise that issue, in *the absence of a showing that the injunction was void.*" (our emphasis)

The Supreme Court of Florida, then, had before it the petitioner's contentions, based on Federal Constitutional grounds, that the two injunctions were beyond the jurisdiction of the State Court. The Court held the injunctions valid and thereby refused to quash contempt proceedings thereon. This petition follows.

ARGUMENT

The State Court injunctions placed unconstitutionally overbroad and vague restrictions on the rights of an association of public school teachers to speak and assemble.

> "That defendant, Dade County Classroom Teachers Association, Inc., its officers, agents, servants, directors, employees and members are hereby en-

joined and restrained, as a part of any scheme or design to strike against either the Dade County Board of Public Instruction, or the public schools and from counseling, enticing, picketing the schools, coercing or otherwise undertaking to persuade or induce any teacher with whom there has been executed a written contract with the Dade County School Board, to fail, decline or refuse to carry out and perform such teachers obligations under such contract; and from counseling, enticing, coercing or otherwise seeking to bring about concerted and massive refusal of the teachers to perform their duties under their contracts, or from advising children not to attend school, or from otherwise performing any act or acts which would bring about a strike or work stoppage or a threat to strike on the part of the teachers under contract with the Dade County School Board, or prevent the resumption of normal activities of the teachers and students." (Temporary injunction of February 23, 1968.)

This would probably be questioned by respondent, whose defense in either event, is justification by necessity. However, we do not have to reach the "thorny problem" of whether, on the facts of this case, such judicial interference with First Amendment guarantees could ever be justified. It is the position of the petitioner that these injunctions are void because of basic infirmities in the procedures by which they were issued; therefore, they can be disobeyed. Contempt proceedings based thereon are also void and should be quashed to avoid the harmful effects of needlessly placing alleged contemnors on trial.

THE STATE COURT INJUNCTIONS ARE VOID

The first injunction was entered following the removal of the cause to the United States District Court, and before that Court remanded it. Full compliance with 28 USC 1446 is clear from the record. The necessary documents were filed with the Federal Court and copies served on the necessary State officials and respondent. On deposition of Respondent, Leonard H. Rubin in direct examination the following appears:

> "Q Did he (the State Court Judge) schedule the hearing on your application for temporary injunction for Thursday, February 22nd, 1968, at 1:00 o'clock p.m.?
> A I believe that's correct.
>
> Q Prior to the scheduled time for a hearing, were you served with documents or copies of documents reflecting that the case you had filed had been removed to the United States District Court in and for the Southern District of Florida pursuant to the provision of 28 U.S. Code 1441, 1443 and 1446?
> A When I came into the courtroom it was approximately 1:00 o'clock . . . there was on counsel table a brown envelope, large size, with my name on it. I proceeded to open it and it appeared to be the removal papers you have referred to. I spoke to George Bolles, (attorney for Dade County School Board) who was in the courtroom, and I asked Mr. Bolles if he had received anything similar and he said, "Yes, I have just seen similar papers on my desk."

Q Do you recall that Judge Nathan was advised that the cause had been removed to the United States District Court and that he was without further jurisdiction to proceed with the hearing on your application for temporary injunction as scheduled?
A I remember you telling him that.

Q And what did Judge Nathan reply?
A To the best of my recollection, the Judge asked Mr. Bolles and myself what we thought about this. We asked the Judge for half an hour to research the matter and I believe I explained to the Judge why I wanted that time. The Judge then stated something to the effect that, "Let us proceed in the matter," or words to that effect.

Q Did the Court then proceed with a hearing on your temporary injunction application?
A Yes, sir.

• • •

Q Did you bring witnesses before the Court?
A Yes, sir.

Q Was testimony taken?
A Yes, sir.

Q Did you introduce exhibits?
A Yes, sir.

Q How long did the hearing last?
A I don't remember. Maybe 3:00 o'clock, maybe 3:30.

Q Following the termination of the hearing, did Judge Nathan then enter a temporary injunction?
A Yes, sir."

On deposition of State Senator Lee Weissenborn (appearing with respondent) in direct examination the following appears:

"Q Just prior to the hearing, do you recall all counsel in the cause, as well as Judge Nathan, were advised that the case had been removed to the United States District Court, pursuant to the provision of 28 U. S. Code 1441, et cetera?
A I heard you make that announcement.

Q Do you recall how Judge Nathan responded to that announcement?
A He, as I recall, listened to your argument and then proceeded with the hearing."

The copy served on the State Court was not placed in the file by either the Clerk or the Judge. From this omission, respondent urges continuing jurisdiction in the State Court to proceed with the scheduled injunctive hearing of February 22, 1968. The cases are to the contrary.

Filing in the State Court of a copy of the petition for removal is a procedural, ministerial act; a failure to file a copy with the State Court does not defeat the jurisdiction of the Federal court. *Covington v. Indemnity Insurance Company of North America* (CA 5th 1958) 251 F.2d 930, cert den; 357 US 921, 2 LEd 2 1365, 78 S Ct. 1362; *Hornung v. Master Tank & Welding Company* (D.C.N.D. 1957) 151 FS 169.

In *Adair Pipeline Company v. Pipeliners Local Union No. 798* (D.C. Tex 1962) 203 F.S. 434 affirmed (CA 5th 1963) 325 F(2) 206, State action was commenced seeking to prohibit a labor union from engaging in a strike. Five minutes prior to the scheduled hearing, the Union's attorney announced the removal of the cause to the Federal Court and handed copies of all documents to the opposing counsel and the State Judge. Because the documents were not actually filed in the Clerk's office, the State Judge proceeded with his hearing and entered an injunction. Subsequently, the District Court declared the injunction void, stating:

> "We have to look at the reason for filing the petition for removal with the clerk of the state court. The apparent reason is to inform the state district judge that he can no longer proceed with the case until the federal court decides whether it will retain jurisdiction or not. There can be no other purpose for this requirement.
>
> In the case before the Court, the evidence shows clearly that the State District Judge had this notice.
>
> • • •
>
> I hold that when a petition for removal is presented to a state district judge, in open court, the requirements of Section 1446(3), Title 28 U.S.C.A., have been complied with; that the state district judge is put on notice that the case has been removed from his court, and that he can no longer proceed." (203 F.S. at 435)

Once the removal has been effected, State Court jurisdiction ceases. 28 USC 1446 (e). All State Court actions entertained thereafter and prior to remand are void. *Adair Pipeline Company v. Pipeliners Local Union No. 798* supra; *Allman v. Hanley* (CA 5th 1962) 302 F(2) 559; *Hopson v. North American Insurance Company* (1951) 233 P(2) 799, 71 Idaho 461, 25 ALR2 1040; *Artists' Representatives Association, Inc. v. Haley* (1966) 274 NYS2 442, 26 A.D. 2nd 918.

In *Allman v. Hanley*, supra, State action instituted against government personnel was then removed to the United States District Court in accordance with 28 USC 1442 (a). Thereafter the plaintiff attempted to obtain service of process in the State Court against a previously unserved defendant who had not joined in the removal proceedings. The United States Court quashed the service and the Court of Appeals affirmed, holding "This attempted service was a nullity" (at P. 562).

In *Hopson v. North American Insurance Company*, supra, the Supreme Court of Idaho stated:

> "By providing in Section 1446 that taking such procedural steps effects the removal of the cause to the Federal Court, which is not found in the earlier Act, Congress has thereby expressly effected the removal of the cause to the Federal Court irrespective of the ultimate determination of the question as to whether or not it is removable; it is not thereafter in the State court for any purpose until and unless the cause is remanded; for that reason the State court is expressly prohibited from proceeding further

> until and unless it is so remanded; under Sec. 72 the removal was never accomplished unless it was a cause removable; under the present Act removal is accomplished and jurisdiction attaches in the Federal Court even though it may be subsequently determined that it should be and is thereafter remanded. Removability is no longer a criterion which gives or denies validity to the proceedings in the State court while a petition for removal to the Federal Court is pending; any such proceedings in the State court under the present act are not sanctioned; they are prohibited." (233 P(2) at 802)

The hearings held in the afternoon of February 22, 1968, after the cause had been removed were a nullity. So was the injunction issued thereafter. The petitioner's counsel remained at the "hearing" at the Court's order, but presented no evidence; did not cross-examine. Petitioner cannot be charged with notice of this "hearing" or the evidence adduced therein. Petitioner had an absolute right to rely on the federal pre-emption created by 28 USC 1446.

Following the remand of the cause on February 23, 1968, the State Court reissued its injunction. To the extent that it was a reissuance of the void injunction of the preceding day it was equally invalid. To the extent that it constitutes an independent order, issued *ex parte* and proscribing First Amendment rights despite continuing availability of the adversary party and its counsel, it must fall under the rule set forth by this Court in *Carroll v. President and Commissioners of Princess Anne* 393 US 175, 21 LEd. 2d 325, 89 SCt 347 (1968).

In *Carroll*, supra, officials of the Town of Princess Anne and Somerset County, Maryland, obtained a restraining order from the State Court to prevent a "white supremacist" organization "from holding rallies or meetings in Somerset County." Of these proceedings this Court stated:

> "The proceedings were ex parte, no notice being given to petitioners, and so far as appears, no effort being made informally to communicate with them although this is expressly contemplated by Maryland procedure." (21 LEd 2d at 329)

Florida procedure contemplates notice prior to issuance of injunctions (F.R.C.P. 1.610) "unless it is manifest . . . that the injury will be done if an immediate remedy is not afforded". The State Court had refused an *ex parte* injunction on Tuesday, February 20, 1968, when schools were scheduled to be open; it granted an injunction without any notice or hearing on Friday afternoon, February 23, 1968, when schools were closed for the week-end and not scheduled to reopen until Monday morning, February 26, 1968. Petitioner was in the midst of an around-the-clock crisis; its officers and counsel were available to attend judicial proceedings at any time on short notice, including Saturday and Sunday.

There was no violence in the *Carroll* circumstances. Therefore, the limited exemption from First Amendment protection of speech "so interlaced with burgeoning violence", was not available; and neither was there violence in the case at bar, the Supreme Court of Florida stating: "The temporary injunction was appropriate even in the absence of any showing of violence or a threat of violence." (App. 10)

The petitioners in *Carroll* were at all times available for notification of the application for a temporary injunction, this Court noting that "they were apparently present in Princess Anne" having held one rally and were scheduled to hold another on the date the injunction issued. And, as this Court further noted: "And some of them were actually served with the writ of injunction at 6:10 that evening." (21 LEd2 at 332) Respondent actually served the petitioner with a copy of the injunction at 6:50 P.M. on February 23, 1968, the date of its issuance.

Based on the foregoing facts, this Court found it did not have to " . . . decide the thorny problem of whether, on the facts of this case, an injunction against the announced rally could be justified." (21 LEd2 at 330) The Court did decide that the injunction had to be set aside, and declared void in its entirety "because of a basic infirmity in the procedure by which it was obtained." This Court held:

> "There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; *but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate* . . ." (21 LEd2 330, 331) (Emphasis added)
>
> • • •
>
> "In the present case, it is clear that the failure to give notice, formal or informal and to provide an opportunity for an adversary proceeding be-

> fore the holding of the rally was restrained, is incompatible with the First Amendment. Because we reverse the judgment below on this basis, we need not and do not decide whether the facts in this case provided a constitutionally permissible basis for temporarily enjoining the holding of the August 7 rally." (21 LEd2 at 333)

Petitioner further submits that the injunctions must fail because of overbroad restrictions placed on First Amendment rights of speech and assembly, not warranted by any circumstances in the case. Petitioner was enjoined from picketing the schools, from "counseling", "enticing", "persuading" or "inducing" teachers to resign their positions in protest of government policy; from advising children not to attend schools; and from every other act which would bring about a strike, a threat of a strike, or prevent resumption of *normal* (sic) activities of the teachers and students. Assuming *arguendo*, the right of any Court to enjoin a peaceful "strike" of public employees, it is clear that this State Court wanted total silence and immobility to accompany obedience to its injunctions. First Amendment rights, if they may be curtailed at all must be narrowly curtailed. Here, more is ordered than needed to satisfy State purposes. The injunction must fail. *Walker v. Birmingham* 388 US 307, 18 LEd2 1210, 87 S.Ct. 1824; *Schneider v. State* 308 US 147, 84 LEd 155, 60 S.Ct. 146; *Saia v. New York* 334 US 558, 92 LEd 1574, 68 S.Ct. 1148; *Kunz v. New York* 340 US 290, 95 LEd 280, 71 S.Ct. 312.

PETITIONER CANNOT BE PUNISHED FOR DISOBEDIENCE TO VOID INJUNCTIONS

The rule of law in Florida is clear: One charged with contempt for violating an order may defend it by showing the order was void. *Freedman v. Freedman* 224 S(2) 424 (3DCA 1969) Disobedience of an order issued without jurisdiction is not contempt. *In re S.L.T.* 180 S(2) 374 (2 DCA 1965); *State ex rel Everette v. Petteway* 1938, 131 Fla 516, 179 S(2) 666. But a showing that an order disobeyed was merely erroneous is no defense. *Seaboard Air Line Ry. Company v. Tampa Southern Ry. Company* (1931) 101 Fla 468, 134 So 529.

This is the rule of law in most other jurisdictions of the United States, including some Federal circuits, although not in Alabama.

In *Heasley v. United States* (CA 8 1963) 312 F(2) 641, the Court of Appe stated:

> "To reduce this opinion to its material point, we think all that need be said in relation to the topic of the above annotation is that federal law is therein clearly shown to be established which sustains the proposition that when a contemnor is proceeded against under Rule 42(b), F.R.Cr.P., and it is determined that his conviction for contempt has resulted from a completely invalid or void order for want of jurisdiction over the subject matter, or the parties, or lack of authority or power of a United States District Court to enter it, as distinguished from an erroneous order of such a court, then statutory law as declared

by the Congress in Chapters 21 and 233 of the Criminal Code, supra, comes into operation. Hence punishment for contempt committed out of the presence of a court must be in relation to a 'lawful writ, process, order, rule, decree, or command' of a federal court. *A totally invalid or void injunction order cannot be the premise of punishment for contempt by such courts.*" (Emphasis added) (312 at 649)

In *United States v. Thompson* (CA 2 1963) 319 F(2) 665, the Court of Appeals stated:

"We hold, therefore, that a mandate is void which is beyond the power and jurisdiction of the issuing court and that the court may not punish for its violation. Ex parte Rowland, 104 U.S. 604, 26 L. Ed. 861 (1881); In re Sawyer, 124 U.S. 200, 8 S.Ct. 482, 31 L.Ed. 402 (1888); Ex Parte Fisk, 113 U.S. 713, 5 S.Ct. 724, 28 L.Ed. 1117 (1885). Thus, the power and jurisdiction of the court to issue a subpoena may be raised for the first time in a proceeding to punish for contempt." (319 at 668)

In Re Berry (Cal 1968) 436 P(2) 273, persons were charged with criminal contempt for wilful disobedience to an order of the Court prohibiting them from requesting or inducing public employees not to work for the County of Sacramento. After the injunction was issued the Union stated that it was void and would be disobeyed. No effort was made to vacate or modify it. The defense was unconstitutionality of the injunction: the County urged that this was irrelevant, since the:

" . . . failure of petitioners to seek vacation or modification of the order through available legal means prior to their willful violation of it precludes their mounting a constitutional challenge in the context of contempt proceedings resulting from such disobedience." (436 P(2) at 280)

The Supreme Court of California held that whatever effect *United States vs. United Mine Workers* (1947) 330 US 258, 67 S.Ct. 677, 91 L.Ed 884 had in federal jurisdiction:

. . . "It is not the law in California. . . . In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt, and that the 'jurisdiction' in question extends beyond mere subject matter or personal jurisdiction to that concept described by us in Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, at page 291, 109 P.2d 942, at page 948, 132 A.L.R. 715: 'Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction!' " (436 P2 at 280)

• • •

"The County's second contention on this point is, as indicated above, that petitioners cannot now be heard to raise objections as to the constitutional overbreadth or vagueness of the order in view of the fact that they failed to seek modification or vacation of it prior to their acts of will-

ful disobedience. It is clear, however, that the law of California is to the contrary. In this state a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial declaration as to its jurisdictional validity. (See Mason v. U.S. Fid. & Guar. Co. (1943) 60 Cal. App.2d 587, 590-591, 141 P.2d 475.) On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such disobedience. If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong. (See Kreling v. Superior Court (1941) 18 Cal.2d 884, 118 P.2d 470; In re Carroll (1933) 135 Cal.App. 672, 677, 28 P.2d 84; Chaplin v. Superior Court (1927) 81 Cal.App. 367, 378, 253 P. 954; cf. In re DeSilva (1948) 33 Cal.2d 76, 79, 199 P.2d 6; see also 1 Witkin, Cal. Procedure, & 155, p. 422.) If, however, the final judicial determination is otherwise he may be punished. In the instant case petitioners have chosen the more perilous of the two courses open to them; the wisdom of their choice is here to be determined." (436 P2 at 281)

Nor will this Court permit a State to hold one in contempt for disobedience to orders beyond the State Court's jurisdiction. In *In re Green* 369 US 689, 8 L.Ed.2 198, 82 S.Ct. 1114 an employer obtained an injunction, *ex parte*, in the State Courts of Ohio to prohibit a Union from picketing. At the time of its issuance, the Union had an unfair labor charge pending with the National Labor Relations Board. The Union's attorney, believing the injunction to be invalid, counselled disobedience, and the picketing continued. Efforts were made to secure a hearing to vacate the injunction but the Court did not have the time for a week. The State Courts held the attorney in contempt for disobedience to its orders. This Court reversed since, *without a hearing to determine if the State Court had jurisdiction to issue the Order*, the contempt must fail; and held:

> ". . . a state court is without power to hold one in contempt for violating an injunction that the state court had no power to enter by reason of federal pre-emption. Even if we assume that an ex parte order could properly issue as a matter of state law, it violates the due process requirements of the Fourteenth Amendment to convict a person of a contempt of this nature without a hearing and an opportunity to establish that the state court was acting in a field reserved exclusively by Congress for the federal agency." (8LEd2 at 201)

In *Ex Parte George* 371 US 72, 9 L.Ed.2 133, 83 S.Ct. 178 this Court, noting that Texas law prohibits punishment for disobedience to an Order beyond the jurisdiction of the issuing Court, vacated a contempt citation against a Union and its officers who had disobeyed a State labor

injunction against picketing. The Texas Supreme Court held that there was jurisdiction to enter the Orders; that the petitioners' conduct was "neither arguably prohibited nor arguably protected by the (National Labor Relations) Act." This Court disagreed, and finding the restraining orders void, used Texas law on the consequences of disobedience to such orders, and vacated the punishments for contempt.

Any reliance of respondent in the decision of this Court in *Walker v. Birmingham (1967)* 388 US 307, 18 L.Ed.2 1210, 87 S.Ct. 1824 is misplaced for three reasons:

First—Alabama law apparently prohibits willful disobedience to any injunction prior to securing a modification or vacation thereof. All that *Walker* holds in this regard is that such a rule of law does not in the particular "circumstances of this case", (18 L.Ed2 at p 1216) violate First Amendment freedoms or Fourteenth Amendment guarantees. *A fortiori*, the Florida rule, permitting disobedence of void injunctions at the peril of the actor, and obviously more consistent with First Amendment liberties, can certainly be sustained. (*Ex parte George* supra).

Second—The *Walker* injunction was alleged unconstitutional solely for its overbreadth and vagueness.

> "The *generality of the language* contained in the Birmingham parade ordinance upon which the injunction was based would unquestionably raise substantial constitutional issues concerning some of its provisions." (18 L.Ed.2 at 1217)

No attack was forthcoming on the State Court's jurisdiction or method of issuance. This Court noted that:

> "And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity". 18 L.Ed.2 at 1217

Valid purposes would have been served by application to the State Court for modification or vacation in that "a narrow and precise scope" may have been judicially afforded the ordinance and therefore the injunction.

On the other hand, Petitioner asserts total and transparent invalidity of the subject injunctions, based on lack of State Court jurisdiction to enter them and basic infirmities in the method of their issuance. This distinction, based on type of attack on the injunction, is acknowledged by the Courts' own reference to *In re Green*, supra (footnote 6, 18 L.Ed.2 at 1216) Moreover, application for relief in the State Court would have been futile; and of no possible value to narrowing these issues. When petitioner was finally heard by the State Courts, its federal constitutional claims were rejected.

Third—By reference to the activities of petitioner, in *In Re Green* supra, this Court implies that an *effort* to challenge the injunction, even if not culminating in a hearing, may be all that is required to preserve the rights of those subjected to the thrusts of an invalid injunction. Green, following the entry of an injunction had his clients disobey it; and then

> . . . "sought to obtain a hearing on his motion to vacate the restraining order. But the judge said none could be had for a week." *In re Green, supra* (8 L.Ed.2 at 200)

It will be noted that the injunction of February 23, 1968 was entered and served in the evening of that date, a Friday. The teachers were not scheduled to work on the weekend; when they did not report on Monday, February 26, 1968, the Court entered an *ex parte* "Order for Hearing for Contempt". Petitioner immediately moved to dissolve the injunction; and was assigned, as his hearing time, the period immediately preceding that assigned for the contempt proceedings (Wednesday, February 28, 1968) at which time it was denied.

Thus, this petitioner has made good faith effort to secure judicial review, comparable to the effort exhibited in *In re Green*, supra.

CONCLUSION

We deal here with void injunctions, issued in violation of paramount Federal jurisdiction, by a State Court, in excess of jurisdiction. Under Florida law they can be disobeyed at the petitioner's peril. Efforts to secure State judicial relief were unavailing; the trial Court denying motions to dissolve and to quash; the Supreme Court of Florida holding the injunctions valid. We urge this Court to grant the Writ of Certiorari; to declare the injunctive orders invalid, and to quash contempt proceedings based thereon.

Respectfully submitted,

Tobias Simon
Attorney for petitioner
223 S. E. 1st Street
Miami, Florida 33131

CERTIFICATE OF SERVICE

I, Tobias Simon, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States do hereby certify that I have this____day of _____, 1970, mailed, First Class postage prepaid, three printed copies of the within petition for Writ of Certiorari and Appendix attached to these Counsel of record at their post office addresses:

Honorable William Frates
Concord Building, 12th Floor
66 W. Flagler
Miami, Florida

Honorable John D. Orr
State Attorney's Office
Metropolitan Justice Building
1351 NW 12 Street
Miami, Florida

Bolles, Goodwin, Ryskamp & Ware, Attys.
City National Bank Building
Miami, Florida

Honorable Leonard H. Rubin
DuPont Building
Miami, Florida

APPENDIX

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1970

CASE NO. 38,386

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit,
Appellant,

v.

LEONARD H. RUBIN, etc., et al,
Appellees.

Opinion filed July 29, 1970

An Appeal from the Circuit Court for Dade County, Raymond G. Nathan, Judge

Tobias Simon, for Appellant

Wm. S. Frates, Assistant State Attorney, for Appellees

ADKINS, J.

This is a direct appeal from an order denying a motion to quash a rule nisi for contempt. The appellant was charged with violating the provisions of an interlocutory injunction. By its motion to quash the rule nisi the appellant alleged deprivation of rights of speech and assembly thereby depriving appellant of rights guaranteed by the First, Thirteenth and Fourteenth Amendments, United States Constitution, and attacked the validity of *Fla. Stat.*, § 83[illegible].221 F.S.A.

This Court previously denied a motion to dismiss or quash this interlocutory appeal and we accept jurisdiction.

The appellant, defendant below, will be referred to as the "Association." The appellees will be referred to as the "Plaintiffs."

On February 19, 1968, at the behest of the Association there was a massive work stoppage by the teachers in Dade County. On February 20, 1968, the Plaintiffs, Leonard H. Rubin, individually and as father and next friend of Deborah Rose Rubin, an infant and a student in the Dade County School System, filed a complaint seeking injunctive relief against the Association. The suit was brought as a class action and alleged that the Association, its membership, officers and directors conspired to cause teacher members to breach their respective contracts, submit their respective resignation as teachers, and refuse to appear and perform their respective functions as teachers. On the same day the Circuit Judge entered an order directing the Association to appear at a hearing on Plaintiffs' application for temporary injunction. The hearing was set for February 22, 1968, and the Association was required to show cause at that time why a temporary injunction should not be entered against the Association and its members to enjoin them from further conspiring to strike until testimony was taken in the cause. After the hearing, a temporary injunction was entered on February 22, 1968. The order granting the injunction recited that notice was given to the Association of the application. The injunction contained the following provision:

> "That defendant, CTA, their officers, agents, servants, employees and members are hereby enjoined and restrained as a part of any scheme or design to strike against the Dade County School

> Board, from counseling, enticing, coercing or otherwise undertaking to persuade or induce any teacher with whom there has been executed a written contract with the Dade County School Board, to fail, decline or refuse to carry out and perform such teacher's obligations under such contract, and from counseling, enticing, coercing or otherwise seeking to bring about concerted and massive refusal of the teachers to perform their duties under their contracts; or to otherwise perform any act or acts which would bring about a strike or work stoppage or a threat to strike on the part of the teachers under contract with the Dade County School Board or prevent the resumption of normal activities of the teachers and students."

In his brief, counsel for the Association states that the cause was removed to the United States District Court on the morning of February 22, 1968. However, the record does not contain the petition for removal nor does it appear from the record that the Association gave written notice of the petition for removal to the adverse parties and filed a copy of the petition with the Clerk of the State Court. U.S.C.A. § 1446 (e), reads as follows:

> "Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, *which shall effect the removal* and the State court shall proceed no further unless and until the case is remanded. (Emphasis supplied) (p. 347)

The hearing which resulted in the original temporary injunction was held on February 22, 1968, and an order of remand was entered by the United States District Judge on February 23, 1968. The Association contends that the State Court was without jurisdiction until the order of remand was entered by the District Court. In discussing the questions of jurisdiction, where the requirements of U.S.C.A. § 1446(e) are not complied with, the Federal District Court in *Hornung v. Master Tank & Welding Company*, 151 F.Supp. 169 (D.C.N.D. 1957), said:

> "The state court acquired jurisdiction of the present action when the Summons and Complaint were duly served upon the defendants in accordance with the Nonresident Motorist Statute. That jurisdiction was active until the removal was finally effected by the filing of a copy of the Petition for Removal with the state court clerk. 28 U.S.C.A. § 1446(e). It then became passive or dormant, pending disposition of the case in federal court. Doerr v. Warner, 1956, 247 Minn. 98, 76 N.W. 2d 505. Federal jurisdiction vested for all purposes when the Petition was filed in this court, the later notice thereof and the filing of a copy thereof in state court operating retroactively to 'effect the removal' as of the date of filing the Petition in federal court. Shenandoah Chamber of Progress v. Frank Associates, D.C. Pa. 1950, 95 F.Supp. 719.
>
> "There is a subsisting dual jurisdiction as to a removed case, and during the brief interlude between filing the Petition for Removal in federal court and the filing in state court of a copy of

such Petition, both courts have active jurisdiction. Donlan v. F. H. McGraw & Co., D.C.N.Y. 1948, 81 F.Supp. 599." (p. 172)

See also *Cavanaugh v. Atchison, T. & S. F. Ry. Co.*, 103 F.Supp. 855 (D.C.Mo. 1952); Cyclopedia of Federal Procedure (Third Edition), Volume 2, § 3.121; Annotation, 45 A.L.R.2d 1045, 1047.

The burden was upon the Association to show by the record that the removal to the United States District Court was effected prior to the hearing of February 22, 1968, and was not remanded prior to the hearing of February 23, 1968, when the second injunction, substantially identical to the first was entered. As to the burden of appellant to make error appear in the record, see *Maloy, Fla. Appellate Prac. and Proc.*, § 26.07, p. 349. The Association failed to meet this burden and the record fails to show that the State Court was without jurisdiction to enter each of the temporary injunctions.

On February 26, 1968, an order for hearing for contempt was entered for alleged violation of the injunctive orders of the State Court entered on February 22 and February 23, 1968. On February 28, 1968, the day of the contempt hearing, a motion to dissolve the temporary injunction was filed and denied.

The Association and its officers were found guilty of contempt and a fine of $30,000. was assessed.

The Association then entered its appeal to this Court and the contempt judgment was reversed because the

motion of the Association for a jury trial was denied by the Circuit Judge. F.R.C.P., Rule 1.840(a)(4) then provided that issues of fact in the contempt proceeding should be determined by a jury of six persons unless waived by the defendant. This requirement was subsequently deleted from the rule. This Court in its opinion, *Dade County Classroom Teachers' Association, Inc., v. Rubin*, 217 So.2d 293 (Fla. 1968), said:

> "We are unable to determine from the record before us that the injunction entered against appellant was based on Sec. 839.221, supra, since neither the complaint nor order of the court makes any reference to the provisions of the statute, but both relate only to concerted action designed to effect a work stoppage by teachers. The constitutional issues, in any event, as well as that of statutory validity if relevant, are fully determined against appellant's contentions by the opinion of this Court in the Pinellas County Classroom Teachers Assn., Inc. et al. v. B.P.I., of Pinellas County, filed Sept. 18, 1968, Fla., 214 So.2d 34.
>
> "There is in our opinion no merit to other objections by appellant relating to alleged ambiguity of the restraints imposed and to jurisdictional questions raised by simultaneous federal court proceedings. Any doubt on the latter point was clearly resolved by order of remand entered immediately before the February 23rd injunction which forms the predicate for the contempt adjudication challenged by appellant." (pp. 295, 296)

After the mandate was issued by this Court, the State Court entered its rule nisi in contempt proceedings wherein it was alleged that the Association and its officers had willfully violated the injunction of February 23, 1968, in various respects on February 25, 26, 27, and 28, 1968. The Association filed its response to the rule nisi and a motion to quash on the grounds, inter alia, that the temporary injunction was issued while the case was removed to the United States District Court; that the injunction was entered without notice; that the injunction was issued pursuant to an unconstitutional statute, *Fla. Stat.* § 839.221 F.S.A., and deprived the Association of rights guaranteed by the First, Thirteenth and Fourteenth Amendments, United States Constitution. This appeal resulted from the order of the trial court denying the motion to quash.

The Association contends that the injunction of February 23, 1968, was entered ex parte and without giving the available adversary parties or their counsel the opportunity to be heard or to participate in the proceedings.

The record clearly shows that the Association received notice of the application for the injunction entered February 22, 1968, and an opportunity to participate in the proceedings. The Association has not furnished this Court with a transcript of the proceeding of February 22, 1968. The temporary injunction entered February 23, 1968, is substantially the same as the one entered the previous day, and a copy of it was served on the Association on February 23, 1968, at 6:50 p.m. The Association was given an opportunity for an adversary proceeding on February 22, 1968. The entering of another injunction substantially the same as the previous one was appropriate under the circumstances of the case *sub judice* and dis-

tinguishes it from *Carrol v. President and Commissioners of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (37 Law Week 4041, 1968).

Aside from the fact that in the prior appeal of this case the Association acknowledged that the injunction of February 23, 1968 was merely a reissuance of the one of February 22, 1968 (of which they had more than adequate notice and an opportunity to be heard), it is clear that because of their willful violations of the injunction and the absence of any resort to their legal remedies for testing the validity of the injunction, the Association and its officers have no standing to raise that issue, in the absence of a showing that the injunction was void. The Association did not seek to challenge the validity of the injunction until the very day of the original contempt hearing. Under these circumstances, the Association cannot now claim the injunction was invalid, for the proper procedure was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity. *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *Carroll v. President and Commissioners of Princess Anne, supra; Seaboard Airline Ry. Co. v. Tampa Southern R. Co.*, 101 Fla. 468, 134 So. 529 (1931); *State ex rel. Everett v. Petteway*, 131 Fla. 516, 179 So. 666 (1938); *State ex rel. Buckner v. Culbreath*, 147 Fla. 560, 3 So. 2d 380 (1941); 43 C.J.S., *Injunctions*, § 224, p. 964.

Under these authorities and these circumstances the Association has no standing to attack the injunction, because of their failure to invoke the judicial process prior to the violations.

The Association further complains the injunction was issued even though the work stoppage produced neither violence or a threat of violence. This case involves the right of public employees to strike in the absence of statutory authority. There are a number of factual differences between employment in the public and private sectors which furnish reasonable justification for different treatment in considering the right to strike. For example, the necessity for preventing goods or services being priced out of the market may have a deterent effect upon collective bargaining negotiations in the private sector, whereas, in the public sector the market place has no such restraining effect upon the negotiations and the sole constraint in terms of the negotiations is to be found in the budget allocation made by responsible legislators or other public agencies.

The orderly functioning of our democratic form of representative government and the preservation of the right of our representatives to make budgetary allocations, free from the compulsion of crippling strikes, require the regulation of strikes by public employees whereas there is no similar countervailing reason for prohibition of strikes in the private sector.

Public employment does not vest in such employees any fixed or permanent rights of employment. As individuals or in groups public employees may discontinue their employment, but they should not be allowed to use this as a screen to effect a work stoppage and engage in a conspiracy to secure higher wages or other benefits. To hold otherwise would result in public agencies being powerless to render public service and to effectively administer public affairs. The public would thereby be deprived of its

right to efficient government. For example, if the members of a fire department or of a police department collectively refused to continue to serve except upon conditions insisted upon by them, unless their employer supinely yielded, the public, subject to taxation therefor, would be deprived of fire or police protection. The right or power to exercise essential governmental affairs would be nullified.

In *Pinellas County Classroom Teachers' Association v. Board of Public Instruction of Pinellas County*, 214 So.2d 34 (Fla. 1968), this Court held that, in the absence of specific statutory authority, the teachers as employees of the government had no right to strike in order to coerce a change in compensation or conditions of employment.

The temporary injunction was appropriate even in the absence of any showing of violence or a threat of violence.

Inherent in this Court's order of remand on the prior appeal (217 So.2d 293) was a finding of this Court that the trial court had jurisdiction to enter the temporary injunction and that the injunction was properly entered. The earlier decision has become "the law of the case" and questions so settled on the earlier appeal are no longer open to question on a subsequent appeal. *Rogers v. State*, 156 Fla. 161, 23 So.2d 154 (1945); *Ferguson v. Brogan*, 111 Fla. 224, 149 So. 772 (1933); *Sanders v. State*, 82 Fla. 498, 90 So. 455 (1921).

The order of the lower court is
Affirmed.

ROBERTS, DREW and BOYD, JJ., concur

ERVIN, C. J., concurs specially with opinion

ERVIN, C.J., concurring specially:

I agree to the judgment herein because the law of the case was made in Dade County Classroom Teachers' Association, Inc. v. Rubin (Fla. 1968), 217 So.2d 293, and the only issue remaining was whether the Circuit Judge should exercise his discretion to order a jury trial concerning contempt of the ex parte February 23, 1968 injunction order. Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325, does not under the present circumstances benefit the Association's challenge to the February 23, 1968, injunctive order because no timely judicial challenge of this order was attempted. See Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1219 (1967).

ROBERTS, DREW and BOYD, JJ., concur

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1968

CASE NO. 37,147

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit,
Appellant,

vs.

LEONARD H. RUBIN, etc., et al.,
Appellees.

CASE NO. 37,148

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit,
Appellant,

vs.

LEONARD H. RUBIN, etc., et al.,
Appellees.

CASE NO. 37,149

DADE COUNTY CLASSROOM TEACHERS' ASSOCIATION, INC., a Florida corporation not for profit,
Appellant,

vs.

LEONARD H. RUBIN, etc., et al.,
Appellees.

Opinion filed December 10, 1968

Appeals from the Circuit Court for Dade County, Raymond G. Nathan, Judge.

Tobias Simon for Appellant

Leonard H. Rubin and Bolles, Goodwin, Ryskamp & Ward for Appellees

Earl Faircloth, Attorney General, and T. T. Turnbull, Chief Trial Counsel, and Marion E. Sibley, as Amici Curiae

DREW, J.

Consolidated for consideration and disposition in this cause are direct appeals from an interlocutory injunction entered against the appellant Association in the Dade County Circuit Court and from an order of that Court finding the Association in contempt and imposing a $80,000 fine for violation of the injunction. By motion to dissolve the injunctive order, denied by the trial court, the appellant Association alleged deprivation of rights of speech, assembly and petition under amendments 1 and 14, U. S. Constitution, and attacked the validity of Sec. 839.221, F.S.[1]

These proceedings were initiated by a complaint of February 20, 1968, filed by the appellee Rubin and styled an action as taxpayer and member of a class of persons

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[1] "839.221 Governmental officers and employees; prohibited participation in strikes or membership in organizations that assert right to strike against government employer.—

(1) No person shall accept or hold any office, commission or employment in the service of the state, or any county or of any municipality, who:

(a) Participates in any strike or asserts the right to strike against the state, county or any municipality; or

(b) Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.

(2) All employees who comply with the provisions of this section are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization."

having an interest (as parent or next friend of children in the Dade County public schools and as beneficiaries of the contracts which the defendant Association was alleged to have conspired to breach) in preventing a strike or breach of contracts by teachers.[2] The Dade County Board of Public Instruction was also made a party defendant, but the complaint asked no relief against the Board and that body did not seek either to obtain or prevent injunctive relief in these proceedings.

Based on testimony adduced on order to show cause,[3] the court by temporary restraining order of February 23 enjoined the association and its members, as a part of any scheme or design to strike against the public schools or the Board of Public Instruction, from:

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[2]No question is raised as to plaintiff's right to bring the suit or the sufficiency of the complaint to state a class or representative action. Our disposition of the appeals does not, of course, constitute an adjudication of those rights.

[3]"THIS CAUSE came on before me, the undersigned, one of the Judges of the above-styled Court, upon prayer for entry of a Temporary Injunction in a verified Complaint, and it appearing that the Plaintiffs have no adequate remedy, and that irreparable damage is being done, and that an unlawful strike by public employees appears to be taking place, and that no adverse effect will be visited upon the Defendants by the entry of an order to appear at a short date upon a hearing for a Temporary Injunction pending a full hearing in this cause, it is now

ORDERED That the Defendants are directed to appear before me, in my Chambers in the Dade County Courthouse, Miami, Florida, at 1 pm Thursday, the 22nd day of February, 1968, and show cause, if any they can, why a Temporary Injunction should not be entered against the Defendants, CLASSROOM TEACHERS ASSOCIATION, individually, and as representative of all of the teachers in the public schools in Dade County similarly situated, and the said teachers, to enjoin them from striking, and from further conspiring to strike, until full testimony is taken in this cause, and to require the Defendant teachers to specifically forthwith return to their full duties and perform their contracts."

> ". . . counseling, enticing, picketing the schools coercing or otherwise undertaking to persuade or induce any teacher with whom there has been executed a written contract with the Dade County School Board, to fail, decline or refuse to carry out and perform such teacher's obligations under such contract, and from counseling, enticing, coercing or otherwise seeking to bring about concerted and massive refusal of the teachers to perform their duties under their contracts, or from advising children not to attend school, or from otherwise performing any act or acts which would bring about a strike or work stoppage or a threat to strike on the part of the teachers under contract with the Dade County School Board, or prevent the resumption of normal activities of the teachers and students."

We are unable to determine from the record before us that the injunction entered against appellant was based on Sec. 839.221, supra, since neither the complaint nor order of the court makes any reference to the provisions of the statute, but both relate only to concerted action designed to effect a work stoppage by teachers. The constitutional issues, in any event, as well as that of statutory validity if relevant, are fully determined against appellant's contentions by the opinion of this Court in the Pinellas County Classroom Teachers Assn., Inc., et al. v. The B.P.I., of Pinellas County, filed Sept. 18, 1968, —So. 2d—.

There is in our opinion no merit to other objections by appellant relating to alleged ambiguity of the restraints imposed and to jurisdictional questions raised by simultaneous federal court proceedings. Any doubt on the latter

point was clearly resolved by order of remand entered immediately before the February 23rd injunction which forms the predicate for the contempt adjudication challenged by appellant.

Plaintiff's motion for determination of contempt alleged among other things that the Association held a mass meeting of several thousand teachers on February 26, a school day, and distributed literature stating "why the Dade County Schools are closed and why the Dade County teachers have resigned and what the teachers of Dade County are asking for in order to come back to work." The contempt order states:

> ". . . it is clear and undisputed from the testimony of the defendants and other witnesses that the said defendants . . . have willfuly and flagrantly disobeyed and defied the injunctive orders of this Court entered on February 22 and 23, 1968. Our form of government is based on the concept of law that any person who disagrees with lawful orders of Court may by orderly legal procedure have those Orders reviewed by appeal. *No one has the right to take the law into his own hands and willfuly disregard and violate any Court order.* Educators must realize that to resort to *such action leads to anarchy* and if followed by other citizens would completely *destroy our Democratic system.*" (e.s.)

Among the ground for reversal of this order asserted by appellant is the court's rejection of its request for jury trial on the charge of contempt. We believe, from a consideration of the court's stated purpose and the nature

of the sanctions imposed,[4] that appellant correctly characterizes the proceeding as one for criminal contempt for which the rules in effect at that time clearly prescribed a right of trial by jury.[5]

Appellant at the outset moved in writing for jury trial in accordance with the rules.[6] The court erred in de-

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[4]" . . . in civil contempt it has been said that the contemnor 'carries the key of his prison in his own pocket.' . . .
"In a civil contempt proceeding an offended party to the cause is primarily seeking relief, personal and private to himself, as distinguished from punishment for conduct offensive to the public or disrespectful to the court and its authority. On the other hand, a contempt proceeding criminal in nature is instituted solely and simply to vindicate the authority of the court or otherwise punish for conduct offensive to the public in violation of an order of the court. Customarily when imprisonment is ordered it is generally for a fixed term and is administered as punishment for an act committed rather than as coercion to compel the contemnor to do something which he has theretofore failed and refused to do. . . ."
Demetree v. State, Fla. 1956, 89 So.2d 490; See also Schoenthal v. Schoenthal, Fla.App. 1962, 138 So.2d 802; Wallens v. Buchanan, Fla. App. 1964, 168 So.2d 687.

[5]F.R.C.P. 1.840(a)(4), subsequently amended provided at the time of this proceeding:
"All issues of law shall be heard and determined by the judge; all issues of fact shall be heard and determined by a jury of six persons selected as in criminal cases, unless waived by the defendant."

[6]"MR. SIMON: Now, if Your Honor please, may I inquire of the Court what it is that we are presently facing in this court? I have before me an order for hearing for contempt. I would like to be advised by the Court whether this is a direct contempt, indirect contempt, civil contempt or criminal contempt.

THE COURT: Well, I don't think we have to go into definitions, Mr. Simon. You are here, the defendants are here pursuant to an order of this Court on a contempt procedure and we are going to proceed today.

MR. SIMON: Well, if Your Honor please—

nying this motion, and the ensuing order imposing penalty for contempt must therefore be reversed and the cause remanded for disposition in accordance with this opinion.

It is so ordered.

ROBERTS and HOPPING, JJ., concur

ERVIN, J., concurs specially with Opinion

CALDWELL, C.J., and ADAMS, J., dissent

ERVIN, J., concurring specially:

I concur in the foregoing opinion. The applicable law involving reciprocal contract rights of school authorities and teachers now has been adjudicated and declared herein and in Pinellas County Classroom Teachers Ass'n., Inc., et al. v. The Board of Public Instruction of Pinellas County, —So.2d—. This sufficies to settle a theretofore unadjudicated and uncertain area of the law. The ancillary issue

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THE COURT: As far as the definition is concerned, why, I am not going to get into legal dissertations as to the various definitions and various types of contempt. So—

MR. SIMON: Then—

THE COURT: I don't believe there is any motion before the Court.

MR. SIMON: There is, Your Honor. There is such a motion. I have prepared and filed with the Clerk at this time a response to the order for rule to show cause. I have submitted to Your Honor demand for trial by jury. . . .

We will be obliged to proceed in any manner that Your Honor orders but we are entitled clearly either to a trial by jury or to be advised by this Court that this is a civil contempt proceeding.

THE COURT: I am denying the motion for trial by jury. Let's proceed in the case."

involving the validity of the trial court's contempt order and penalty, we decide adversely to Appellees inasmuch as the order and penalty were entered below without benefit of the then required jury determination. No good purpose would be served at this date in visiting a contempt penalty on Appellants. Thus by our holding we do not disturb a now quiet situation by authorizing a contempt penalty in a previously unsettled area of law; rather, we have made definitive decisions that are applicable to the future and spell out the contract rights of the public, the school authorities, and the teachers, as well as the power of contempt of courts in future cases involving such rights.

[redacted]

In the

Supreme Court

of the

United States

[redacted]

No. [redacted]

[redacted]

vs.

[redacted]

[redacted]

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